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November 30, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 12, 2006

Case Number: TSO-0408

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual is eligible for an access authorization. As discussed below, I find that an access authorization should be granted in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the notification letter included a statement of the derogatory information causing the security concern.

The Notification letter indicated concerns under Section 710.8(1) (Criterion L), which pertains to reliability and trustworthiness. In this regard, the letter cites a pattern of criminal conduct,

1/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

including an arrest for shoplifting in 2003, and admission of shoplifting about 10 times between 1994 and 1999. The letter also notes that during 1997 the individual was charged with (i) using a telephone to terrify, or intimidate his ex-fiancée ; (ii) violating an order of protection and aggravated stalking [involving his ex-fiancée]; (iii) threatening his ex-fiancée, resulting in a restraining order against him [issues (i), (ii) and (iii) will be referred to as ex-fiancée incident]; and (iv) burglary, larceny and receiving stolen property [hereinafter stolen property incident].²

According to the notification letter, these incidents raise Criterion L security concerns because they indicate a lack of trustworthiness.

The notification letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual testified on his own behalf, and brought forward as witnesses his counselor/therapist, his girlfriend, his supervisor, a co-worker for whom the individual acts as a technical assistant, a fellow student, and two former co-workers, now social friends. The DOE Counsel presented no witnesses.

II. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access

2/ In this incident, which occurred in 1997, the individual took a bicycle that he had repaired and for which he had not been paid. The bicycle was located at a repair shop and the owner of the bicycle had not claimed it.

authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

III. The Hearing

A. The Individual

The individual admits that the events cited in the notification letter took place. He further admits they were bad mistakes, and that they show a pattern of poor behavior. Transcript of Hearing (Tr.) at 128, 129, 130, 139, 148. He believes that this behavior was caused by immaturity, self doubts, poor attitude, and an identity struggle. Tr. at 130, 136, 138, 140. He indicated that he previously did not have the character and moral fiber to withstand his impulsive behavior. Tr. at 150. He indicated that he has always been up front and honest about his past. Tr. at 151. He also noted that he sought counseling in order to try to understand himself and his actions. Tr. at 139. Through his therapy, he believes that he now has found the inner strength and the tools to cope with the stresses of life. Tr. at 147, 153, 154.

He believes that he has undergone other changes since the last shoplifting incident in 2003. For example, he now feels a new sense of responsibility with his full-time position at the DOE site and the fact that he owns his own home and must finance and care for it. Tr. at 133, 134. He believes that he now has the inner strength to

cope with the stresses of life. Tr at 147, 153, 154. He is proud of what he has achieved, and is proud of being an honest, upstanding, reliable citizen. Tr. at 154. He maintains that he no longer has any impulse to shoplift or commit any other improper or illegal act, but, in any event, he can now recognize an improper impulse and take quick, appropriate action. Tr. at 154. He has a plan to manage his finances so that they do not create undue stress for him. He regularly pays his mortgage and other bills, including credit card bills. Tr. at 155, 156. His other techniques for avoiding stress include recreational activities and exercise. Tr. at 156. He stated that he will continue to seek counseling. Tr. at 154. He is determined that the types of incidents that are at the heart of this proceeding will not recur. Tr. at 155, 156. He testified that his "life will [now] hold up to scrutiny no matter who is examining it." Tr. at 151.

B. The Counselor/Therapist

The individual's counselor is a "licensed professional clinical counselor." Tr. at 91. She has counseled the individual for about a year, usually once a week or once every two weeks. Tr. at 94, 96. She was aware of the legal issues that are the subject matter of this proceeding. Tr. at 95. She found the individual to be "very forthcoming" about those issues. Tr. at 98. She believed that his actions were caused by low self esteem. Tr. at 96, 98, 109. The counselor believes that through therapy, the individual has come to value himself, and find meaning within himself, and that this new confidence will correct the previous behavioral issues. Tr. at 100, 102, 110. She believes that the individual is now trustworthy and dependable. Tr. at 105, 111. She is confident that the illegal behaviors that are the subject of this proceeding will not recur. Tr. at 103, 109-110, 111.

C. Personal Witnesses: the individual's girlfriend; supervisor; current co-worker; two former co-workers/social friends; fellow student

The individual's personal witnesses had all known the individual for at least three to six years. Tr. at 14, 23, 41, 76. Two of the witnesses, including his girlfriend, had known him for considerably longer. Tr. at 55, 114. The witnesses either worked or studied with the individual. Several knew him socially, as well. Tr. at 9, 23, 25, 27, 41-42, 56, 76, 78, 114, 116. All of the witnesses were aware to some degree about the shoplifting, stolen property and ex-fiancée incidents. The individual had discussed these incidents with the witnesses as a part of his normal interactions with them,

and not especially in anticipation of the hearing. Tr. at 9, 28, 43, 45, 57, 62, 79, 123. All of the witnesses believed that the individual was reliable, honest and trustworthy. Tr. at 16, 19, 20, 32, 46, 49, 61, 74, 82, 89, 118-19. Those who worked with him testified that he performs well on the job. Tr. at 15, 49, 119, 121. Further, none of these witnesses had ever seen the individual act in an impulsive, angry or unusual manner. Tr. at 21, 22, 37, 38, 54, 73, 87.

IV. Analysis

The individual admits that the events cited in the notification letter took place, and that they give rise to a security concern. The issue here is therefore whether he has shown that he can be counted on in the future to maintain his behavior at the level expected of those holding a security clearance.

As is evident from my description of the hearing testimony, all witnesses believed the individual to be reliable and trustworthy. They do not believe that the individual is likely to return to the unacceptable patterns that he exhibited several years ago. The individual's therapist testified very convincingly on this point.

Furthermore, I found the individual himself to be very earnest and candid. I was impressed by the individual's honesty with his friends and co-workers. He had informed all of these witnesses about his past illegal behavior, not just in contemplation of the hearing, but as part of his ongoing interaction with them. This indicates to me that he is now fundamentally honest in how he presents himself to others, and in any event is not the sort of person who would allow himself to be placed in a position of coercion or duress.

I further believe that the individual is at a different place in his life from time of the ex-fiancée, stolen property and shoplifting incidents. He is highly motivated to succeed. He now has a position of responsibility with a DOE contractor. He also is responsibly managing his own home. He is about to complete his college degree. He has his finances under control. He is proud of those milestones, and I am convinced that he would not want to jeopardize all that he has achieved by returning to his prior irresponsible, impulsive and illegal behavior.

Further, he has made considerable personal efforts with his therapist to try to understand himself and his motivations. The individual is highly intelligent and reflective, and I believe,

based on his testimony and that of his therapist, he now has the tools, the perspective and the maturity to cope with the stresses that in the past might have caused some irresponsible behavior.

Finally, at the time of the last incident, in 2003, the individual was 29 years old. He is now 32 ½ years old. I think that in this three and one-half year period the individual has gone beyond that immature, irrational time in his life, and that he can now be counted on to be a mature, responsible employee and law-abiding citizen. I believe that this is how he now sees himself, and what he expects from himself. I therefore find that the individual has mitigated the security concerns regarding his reliability and trustworthiness.

V. CONCLUSION

As indicated above, I believe that the individual has mitigated the Criterion L concerns raised in the notification letter and I therefore find that he should be granted an access authorization. The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: November 30, 2006